(8)

No. 93-6497

In The

Supreme Court of the United States

October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari
To The Fifth Circuit Court Of Appeals

PETITIONER'S BRIEF

*MANDY WELCH
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917
fax (713) 522-2733

DOUGLAS G. ROBINSON
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7800
fax (202) 393-5760

*Counsel of record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

58 PP

QUESTION PRESENTED

Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651(a), in order to appoint counsel for an indigent *pro se* death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINION BELOW AND JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit, affirming the order of the United States District Court for the Northern District of Texas denying a stay of execution and appointment of counsel, was entered on October 26, 1993, *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993). The petition for certiorari was timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the following federal statutes, copies of which are attached as an appendix, pursuant to Sup. Ct. R. 24.1(f): 21 U.S.C. § 848(q), 28 U.S.C. § 1651, 28 U.S.C. § 2251, 28 U.S.C. § 2254, and 28 U.S.C. § 2283.

STATEMENT OF THE CASE

A. The Unavailability of Counsel for Post Conviction Representation in Texas

Bench and bar now generally recognize that not every indigent Texas death row inmate can be assured of having counsel available to represent him in state or federal post conviction proceedings. Unlike many states, Texas has not established a "public defender" to represent condemned prisoners in such actions; nor is there a state right to post conviction counsel. Private attorneys

who can be recruited to represent death row prisoners in state habeas proceedings are almost never compensated. The number of unrepresented death row prisoners is substantially increasing and the number of private attorneys able and willing to undertake this difficult and complex work *pro bono* is not. At the same time, Texas trial courts are setting execution dates for unrepresented inmates in record numbers, and there is no assurance that recruited counsel will be given sufficient time to provide adequate representation before a prisoner is executed. *See* Spangenberg Group, *A Study of Representation of Capital Cases in Texas* (March 1993) [hereafter referred to as the "Spangenberg Report"].

Judge Edith Jones of the Fifth Circuit cautioned more than three years ago that "the growing death row population [in Texas] requires increased counsel resources, while the present system discourages the appointment of counsel." Hon. Edith Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. BAR J. 850, 851 (1990). Judge Jones recognized that Texas not only fails to require counsel in habeas proceedings, but actively discourages the recruitment of attorneys by practicing, in her words, "[d]ocket control by execution date." *Id.* That is, Texas courts set execution dates for unrepresented inmates promptly after the direct appeal is final and use execution dates as filing deadlines throughout the post conviction process.[1] As

[1] The Court has experienced firsthand the disorder created by Texas' practice of setting execution dates at such an early stage. In *Cole v. Texas*, 499 U.S. 1301 (1991), Justice Scalia stayed an execution scheduled to occur before the Court could consider the case on direct review, and advised the State that he would stay any scheduled execution under such circumstances. *Id.*

Judge Jones noted, trying to force the filing of state and federal habeas petitions by setting execution dates before post conviction counsel can be obtained makes it nearly impossible to find counsel who are willing and able to do the work that is necessary to ensure "thorough and adequate review by state and federal courts." *Id.*

A study of the Texas system commissioned by the Texas State Bar in the spring of 1990 has thoroughly documented the problems identified by Judge Jones. The report, issued in March 1993, concluded that "the problems [of representation in post conviction proceedings] in Texas far outweigh those in any other death penalty state in the country." Spangenberg Report at iii. The problem, it continued, was largely due to the fact that, while Texas district judges have discretion to appoint counsel and compensate them in state habeas proceedings, they almost never do so. *Id.* at vii. As the report found, the resulting situation has passed "the crisis level and requires immediate attention." *Id.* at ix. The report recommended several reforms.[2] None has been adopted.

Despite this admonition, Texas trial courts continue to set execution dates before the Court has considered a timely filed petition for writ of certiorari, and both those courts and the Court of Criminal Appeals routinely deny requests (based on *Cole*) for a stay of execution. This obdurate refusal forces inmates to bring their request to the Court, which routinely stays the execution, but not before the petitioner has been forced to litigate the issue through three levels of the state and federal courts.

[2] The recommendations included, *inter alia*, that (1) the State pay private attorneys to represent death row prisoners in state habeas proceedings, (2) the State establish an organization of full-time attorneys to represent death row prisoners in state

The lack of counsel and the inability to obtain counsel has forced many prisoners during the past two years to seek stays of execution and appointment of counsel from federal courts to preserve the right to challenge their convictions and death sentences under 28 U.S.C. § 2254 *et seq*. These inmates have been assisted by the Texas Resource Center, a non-profit law office established to ensure that indigent death row inmates in Texas have legal representation in state and federal habeas corpus appeals.[3] JA 6.

Until recently, if the Texas courts refused to stay an imminent execution for an unrepresented death row inmate and if the Center's and others' efforts to recruit

---

habeas proceedings, and (3) the courts defer issuing execution warrants until a prisoner has completed one full round of review, including state and federal habeas corpus proceedings. *Id*. at 166-68.

[3] The federal district courts in Texas have designated the Texas Resource Center as a Community Defender Organization in accordance with 18 U.S.C. § 3006A for the purpose of providing "representation, assistance, information, and other related services to eligible persons and appointed attorneys in connection with federal death penalty habeas corpus cases pursuant to subsection (g)(2)(B) of [the Criminal Justice Act]." Addendum to the Plan for the Implementation of the Criminal Justice Act of 1964, As Amended, 18 U.S.C. § 3006A, of the United States District Court of the Northern, Eastern, Southern and Western Districts of Texas. Pursuant to this designation, the Resource Center is required to screen and recruit qualified members of the private bar who are willing to provide representation in death penalty post conviction proceedings in federal court. In addition the Resource Center is "authorized to serve as counsel of record, and shall recommend to the Court those cases in which its appointment as counsel of record is appropriate." Addendum to [CJA] Plan, par. 5(d).

counsel failed and execution was imminent, the Center would assist the inmate in preparing and filing a perfunctory habeas petition in federal court.[4] Such a petition typically presented a single exhausted claim taken verbatim from the direct appeal brief. The perfunctory petition accompanied an application for appointment of counsel and for a stay of execution, requesting sufficient time for appointed counsel to review the record, conduct appropriate research and investigation, and prepare a real habeas petition. This procedure was devised to accommodate the State's position that a pleading designated a "petition" had to be filed to give the federal courts jurisdiction to enter a stay; the State routinely agreed not to oppose a stay if such a perfunctory "petition" were filed.[5]

---

[4] The Center is funded primarily by a grant from the Administrative Office of the United States Courts. The funding and staffing under that grant require that the majority of the Center's time and resources be devoted to providing consultation, information, litigation assistance and other related services to recruited and appointed attorneys in capital federal habeas corpus proceedings. Although the Center provides direct representation to a small number of inmates, it does not have the staff and resources needed to represent all Texas death row prisoners whose cases are in or entering the post conviction stage. Moreover, the Center has never been assigned, nor been able to serve, that function. *See* JA 46-47.

[5] *See, e.g.*, JA 73. Over the last 18 months, the filing of a perfunctory petition resulted in a stay and appointment of counsel in a number of cases. *See* JA 55-68. In each case, the petitioner informed the court that the perfunctory petition was being filed in response to the State's objections regarding the court's jurisdiction to enter a stay and appoint counsel. In each case a stay was entered without opposition once the "petition" was filed. Where available, counsel was appointed and given

Although awkward, this practice allowed Texas death row prisoners to avoid execution before having an opportunity to file even their first habeas petition. The practice was abruptly derailed this past fall, however, by the case of *Gosch v. Collins*, No. SA-93-CA-731 (W.D. Tex. Sept. 15, 1993).

In *Gosch*, as in many other recent cases, the trial court set an execution date shortly after this Court denied Mr. Gosch's certiorari petition from direct appeal. After unsuccessfully asking the state courts for a stay, the Center, acting as temporary counsel, filed a perfunctory petition in the United States District Court for the Western District of Texas and requested a stay and appointment of counsel. The Center informed the Court that the "petition" did not reflect any legal research, transcript review, or other development of Gosch's claims for relief, but merely asserted a single claim raised in his direct appeal. The Center explained the State's position that the Court's jurisdiction to grant a stay depended upon the filing of such a document. Further, the Center pointed out that a stay was necessary to provide sufficient time to appoint counsel and to give appointed counsel an opportunity to investigate, research, prepare and file a proper habeas petition. Petition, at 3-4, *Gosch v. Collins*, (WD Tex. 1993) (No. SA 93-CA-731).

---

additional time to prepare a properly investigated and researched amended habeas petition. *See* JA 60-61, 66. Where recruited counsel was not available, the Center was given additional time to recruit an attorney who was then appointed and given additional time to file a proper amended habeas petition. *See* JA 59, 62, 67.

Following the procedure established during the previous two years, the State did not oppose the issuance of a stay once Mr. Gosch filed his one-issue "petition." Nevertheless, the district court treated the perfunctory habeas petition as if it represented a complete petition raising all the constitutional claims available to Mr. Gosch and denied relief *on the merits*, denying a stay as well. The Fifth Circuit affirmed, *see Gosch v. Collins*, 1993 U.S. App. Lexis 29086 (5th Cir. Sept. 16, 1993). Mr. Gosch's petition for certiorari is presently pending in this Court. *Gosch v. Collins*, No. 93-6025 (filed Sept. 16, 1993).

Thus, *Gosch* dynamited the rough compromise theretofore achieved by the Resource Center and the State, under which the filing of a perfunctory petition permitted a federal district court to issue a stay and appoint counsel. The Fifth Circuit's opinion in *Gosch* permits – even encourages – a federal district court to examine a perfunctory "petition," filed only to meet the State's jurisdictional objections, and deny it on the merits. In that event, no stay would issue. Equally important, even if the prisoner somehow avoids immediate execution, any subsequent petition he attempts to file in federal court may be treated as a successor petition subject to summary dismissal.[6]

---

[6] This is precisely what occurred in *Gosch*, where the district court dismissed a second petition in part because it constituted an abuse of the writ. *Gosch v. Collins*, No. SA-93-CA-736 (W.D. Tex. Oct. 12, 1993).

B. Mr. McFarland's State Court Proceedings

1. Trial and Direct Appeal

On November 13, 1989, Mr. McFarland was convicted of capital murder in Criminal District Court No. 3, Tarrant County, Texas. Following a sentencing hearing, he was sentenced to death. The Texas Court of Criminal Appeals affirmed his conviction and sentence, denying rehearing December 9, 1992. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). This Court denied review June 7, 1993. *McFarland v. Texas*, 113 S. Ct. 2937 (1993).

2. Proceedings in State Court after Affirmance

On August 16, 1993, Hon. Don Leonard, presiding in Criminal District Court No. 3 of Tarrant County, ordered that Mr. McFarland be executed on September 23, 1993. JA 3.

On September 19, 1993, a Resource Center attorney presented Mr. McFarland's written *pro se* motion to Hon. Joe Drago, Criminal District Judge of Tarrant County, asking the court to stay or withdraw its September 23, 1993, execution date so that the Center could recruit counsel to represent Mr. McFarland in a state habeas corpus proceeding.[7] A letter from the Center's executive

---

[7] This *pro se* motion, which was presented to Judge Drago in the absence of Judge Leonard, does not appear in the record below. However the *pro se* motion is mentioned in two letters to Judge Leonard, JA 6, 16, and in Judge Drago's order modifying Mr. McFarland's execution date to October 27, 1993. JA 12.

director supporting Mr. McFarland's motion was also presented to Judge Drago. See JA 6. That letter asked the court to "withdraw [the] execution date, allow [the Center] sufficient time to recruit counsel [for Mr. McFarland], and grant new counsel at least 120 days to investigate, research, prepare and file [a] habeas petition." JA 6-7. Anticipating the State's argument (made in other cases) that a request for stay to recruit counsel was unnecessary and a "delaying tactic," *id.*, the letter described the circumstances that had made it impossible for the Center to recruit counsel for Mr. McFarland any earlier:

> [R]epresentation of death row inmates in habeas proceedings is in crisis because (1) counsel in state habeas proceedings are generally not compensated; (2) the number of death row inmates needing post conviction representation is substantially increasing each year; and (3) the number of private attorneys willing and able to make the sacrifice of time and resources required by these cases is decreasing.

JA 7-8. The letter also explained that the Center could not represent Mr. McFarland directly because of its lack of staff and resources and its obligations in other cases. JA 9.

The State opposed a stay, arguing that the court had no jurisdiction to enter a stay unless a petition for writ of habeas corpus actually had been filed. Appendix K to Opposition to Pet. App. for Stay of Execution (dated October 25, 1993). On September 20, 1993, Judge Drago modified the execution date, moving it back 34 days to October 27, 1993, but declined to appoint counsel or provide the time requested for the recruitment of counsel. JA 12.

The Center was unable to recruit counsel over the next four weeks, and on October 16 reported its lack of success to the state court:

> Simply put, no competent lawyer will take on a highly complex case pro bono, where literally, life is at stake, without adequate time to prepare it. . . . There is no realistic prospect of success of recruiting counsel for Mr. McFarland so long as he continually faces an execution date less than a month away and there are no assurances that recruited counsel will be given sufficient time to prepare a proper habeas petition.

JA 17. The Center renewed Mr. McFarland's request for a stay to allow for the recruitment of counsel and asked the court to exercise its discretionary power under state law to appoint counsel to reduce substantially the recruiting difficulties. *Id.* The court refused to modify or withdraw Mr. McFarland's execution date.

On October 21, 1993, Mr. McFarland filed a *pro se* motion in the Court of Criminal Appeals, requesting that the Court remand the case to the district court with instructions to allow time for the Center to recruit an attorney. JA 21. The Center supported Mr. McFarland's motion and asked the Court to reconsider its approach to requests by *pro se* inmates for stays of execution to obtain habeas counsel. JA 24.[8] The Center asked the Court to

[8] The Center noted that when district judges had "enter[ed] scheduling orders specifying the recruiting deadline and providing a later deadline for the filing of an application . . . [i]n most cases . . . the Center has met the recruitment deadline and the recruited attorney has met the filing deadline." JA 25.

> stay Mr. McFarland's execution and to [grant] 120 days to recruit counsel, order the district court to order payment of counsel at a reasonable hourly rate, and allow recruited or appointed counsel 120 days in which to file a state habeas application.

JA 28.

A divided Court of Criminal Appeals denied the stay without comment. JA 40. Judge Clinton dissented, urging his colleagues:

> "[S]crew your courage to the sticking place," W. Shakespeare, *MacBeth*, I. vii. 10, and confront head on "the crisis stage in capital representation" in this State.

Ex parte McFarland, No. 25, 518-01 (Tex. Ct. Crim. App., October 22, 1993) (dissenting opinion) (citing and quoting Spangenberg Group, *A Study of Representation of Capital Cases in Texas*, (State Bar of Texas) at i-ii).

On October 23, Mr. McFarland filed a petition for writ of certiorari in this Court, seeking review of the Court of Criminal Appeals' refusal to appoint counsel in his case. *McFarland v. Texas*, No. 93-6483. That petition was subsequently denied. *Id.*, ___ U.S. ___, 114 S.Ct. 575 (1993).

C. This Action

On October 22, 1993, Mr. McFarland filed a *pro se* motion in the United States District Court for the Northern District of Texas requesting a stay of his October 27 execution, appointment of qualified counsel, and a reasonable time for counsel to prepare and file a federal habeas petition. JA 41. Mr. McFarland stated, *inter alia*:

> I am scheduled to be executed October 27, 1993, and do not have a lawyer to represent me. . . . [The Center] has told me that it cannot represent me directly. . . . I wish to challenge my conviction and sentence under 28 U.S.C. § 2254. . . . I am entitled to the assistance of counsel under 21 U.S.C. § 848(q)(4)(B) . . . [and] unless this Court grants a stay of execution, the right to counsel will become meaningless. . . . [T]his Court has jurisdiction to stay my execution under *Brown v. Vasquez* 952 F.2d 1164 (9th Cir. 1991) . . . [and] even apart from my right to counsel, this Court is required under 28 U.S.C. § 2254 to conduct a meaningful review of my conviction and sentence, a review that cannot take place before my scheduled execution.

Id. The Center, which assisted Mr. McFarland in preparing his motion, supported the request for stay and appointment of counsel in an accompanying letter.[9]

By letter dated October 24, 1993, the Center provided the district court with a copy of the Court of Criminal Appeals' order denying a stay and suggested that the court hold "a scheduling conference with respect to Mr. McFarland's federal habeas proceeding." JA 74. The letter described the Center's prior practice of filing perfunctory habeas petitions on behalf of unrepresented inmates and explained why the Fifth Circuit's ruling in *Gosch* rendered that approach unavailable in Mr. McFarland's case:

---

[9] The letter explained that in several other cases federal judges in Texas had exercised their jurisdiction to grant a stay of execution in order to permit time to locate counsel and that in each case the Center subsequently found counsel within the time allotted by the court (usually 100-120 days). JA 50-54.

> [I]n light of *Gosch* we do not feel that we can file a perfunctory petition in Mr. McFarland's case without an assurance that it will be recognized for what it is and not become Mr. McFarland's only vehicle for federal review of his conviction and death sentence. We do not represent Mr. McFarland, and under the circumstances, I feel very strongly that we should not take any action that makes it appear that he has counsel when in fact he does not. At the same time, we want to cooperate with the Court and the Attorney General to assure that Mr. McFarland has qualified counsel who is given sufficient time and resources to represent him properly. In this regard, I request that the Court schedule a conference that includes a Resource Center attorney and someone from the Attorney General's office to discuss an appropriate resolution of our dilemma.

Id.

On October 25, the district court denied the motion for stay and appointment of counsel, concluding that "McFarland is not entitled to [appointment of counsel] because there is not a 'post conviction preceding [sic] under section 2254 or 2255 of Title 28' pending" and, further, that "because there is not a pending habeas corpus proceeding, the court has no jurisdiction to enter a stay of execution. . . . " JA 77. The following day, the district court denied Mr. McFarland's application for certificate of probable cause, holding that the instant proceeding "is not now, and has never been, a habeas corpus proceeding." JA 79.

Mr. McFarland immediately filed an application for certificate of probable cause and a motion for stay of execution with the Fifth Circuit, with attorneys from the Center appearing as temporary counsel for purposes of the appeal. JA 81. The Fifth Circuit denied the application and motion on the evening of October 26, 1993,[10] holding, first, that the Anti-Injunction Act barred the relief requested. *McFarland v. Collins*, 7 F.3d 47, 48 (5th Cir. 1993). Although the court noted that Congress expressly authorized the federal courts to enjoin state proceedings under 28 U.S.C. § 2251, it found § 2251 inapplicable because no habeas petition was "pending" before the district court and "none is pending here." *Id.* at 49. The court concluded that a habeas proceeding is "pending"

---

[10] Shortly before the Fifth Circuit ruled, federal district court personnel contacted a Fort Worth attorney, Danny D. Burns, and asked him whether he would accept appointment in Mr. McFarland's case; Mr. Burns said that he would. Later, district court personnel told Mr. Burns that the court did not have jurisdiction to appoint him but that the court might grant a stay and appoint him if he were to file a document entitled a "petition for writ of habeas corpus" and agree to represent the petitioner. Concluding that the risk of filing such a perfunctory petition (*see Gosch v. Collins, supra*) was outweighed by the risk that no stay at all would issue, Mr. Burns complied. The district court thereupon denied the stay based on the merits of the incomplete, one-issue petition. *McFarland v. Collins*, No. 4:93-CV-723-A (W.D. Tex. Oct. 26, 1993). On appeal a divided Fifth Circuit issued a stay (at virtually the same moment this Court did). *McFarland v. Collins*, 8 F.3d 258 (5th Cir. 1993). Mr. Burns later dismissed the perfunctory petition under FED. R. CIV. PRO. 41(a) so that a later-filed, complete petition would not be deemed an abuse of the writ. The Fifth Circuit then dismissed the appeal and lifted its stay as moot. *McFarland v. Collins*, 8 F.3d 256 (5th Cir. 1993).

only "when commenced" by an application for habeas relief and that a "motion for stay and for appointment of counsel [is not] the equivalent of an application for habeas relief." *Id.*[11]

A petition for writ of certiorari was immediately filed in this Court. At 11:50 p.m. (Central time), the Court granted a stay of execution. *McFarland v. Collins*, ___ U.S. ___, 114 S. Ct. 374 (1993). The petition was granted on November 22, 1993, limited to Question 2 therein. *McFarland v. Collins*, ___ U.S. ___, 126 L. Ed.2d 446 (1993).

SUMMARY OF ARGUMENT

Within five days of his scheduled execution, Mr. McFarland filed a *pro se* motion in the federal district court making clear his resolve to challenge his conviction and death sentence through a petition for writ of habeas corpus under 28 U.S.C. § 2254. He explained, however,

---

[11] In rejecting Mr. McFarland's argument that § 2251 applied, the court said that it did not "share the view" of the Ninth Circuit in *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1778 (1992), which held that § 2251 did apply in similar circumstances. *McFarland*, 7 F.3d at 49. The court also rejected Mr. McFarland's argument, not at issue here, that a stay of execution and appointment of counsel were necessary to provide him meaningful access to the courts. *Id.* Finally, the court held that because no habeas petition had been filed, Mr. McFarland was unable to show a probability of success on the merits. *Id.* In a footnote, the court observed, incorrectly, that none of Mr. McFarland's possible claims in a federal habeas petition had been exhausted in state court. *Id.* at 49 n.1.

that he did not have a lawyer and that he was unable to retain a lawyer because of his indigency, and unable to prepare and file a petition for himself that would adequately account for and present all the potentially meritorious constitutional claims in his case. He explained further that he had been unrepresented since the denial of his petition for writ of certiorari on direct appeal and that the state courts had refused to appoint counsel for state habeas proceedings. As a result, he was unable to prepare and file a state habeas petition. He asked that the federal district court stay his execution and appoint counsel pursuant to 21 U.S.C § 848(q)(4)(B) to enable him to file a federal habeas petition.

The threshold question presented by this case is whether the *pro se* pleading filed by Mr. McFarland commenced a federal habeas proceeding. If it did, the lower courts clearly erred in refusing to stay Mr. McFarland's execution and appoint counsel pursuant to 28 U.S.C. § 2251 and 21 U.S.C. § 848(q)(4)(B). If it did not, the lower courts were still in error, for there was ample authority under the All Writs Act, 28 U.S.C. § 1651(a), for the district court to grant a stay and appoint counsel.

Congress' intent in enacting 21 U.S.C. § 848(q)(4)(B) is determinative of whether Mr. McFarland's *pro se* motion commenced a habeas proceeding. Section 848 creates an unconditional entitlement to counsel for indigent capital habeas petitioners in federal court. Whether Congress intended that entitlement to be available in advance of the filing of the habeas petition, so that counsel could investigate, research, identify, and draft claims in order to assist in the preparation of the petition, is revealed by several provisions of § 848(q) and the context in which it

was adopted. Upon examination of these matters – the express language in § 848(q)(4)(A) permitting counsel to be appointed "at any time" during the post conviction process, § 848(q)(6)'s recognition of the extraordinary need for counsel in capital cases by its requirement that only experienced counsel be appointed to represent capital habeas petitioners, § 848(q)(4)(9)'s authorization of investigative resources in post conviction proceedings for the assistance of appointed counsel, the longstanding rule under the Criminal Justice Act that counsel could be appointed in habeas proceedings in the discretion of the court at any stage of the proceeding,[12] and finally, Congress' clear intent to eliminate the disadvantages of poverty in securing the assistance of counsel in capital federal habeas proceedings – one must conclude that Congress intended to make the services of counsel available in advance of the filing of the petition.

To give effect to this right, the federal courts must have the ability to grant stays of execution when necessary to provide an adequate opportunity for counsel to render the assistance envisioned by Congress. Otherwise, the entitlement to the assistance of counsel is a hollow and cruel gesture.

For these reasons, the Court should hold that a pleading like the one filed by Mr. McFarland commences

---

[12] *See* 18 U.S.C. § 3006A; *see also* Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts.

a federal habeas proceeding under 28 U.S.C. § 2254, giving the federal courts authority to appoint counsel under 28 U.S.C. § 848(q)(4)(B) and stay executions under 28 U.S.C. § 2251.

For the very same reasons, the Court should hold that there is authority under the All Writs Act, 28 U.S.C. § 1651(a), to appoint counsel and stay an execution in the circumstances presented by Mr. McFarland's case. In authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," the All Writs Act "make[s] explicit the right to exercise powers implied from the creation of such courts." Reviser's Notes, 28 U.S.C.A. § 1651 (West 1981). As the Court recognized in another federal habeas case, the Act is intended to serve as "a 'legislatively approved source of procedural instruments designed to achieve the "rational ends of law." ' " *Harris v. Nelson*, 394 U.S. 286, 299 (1969).

In the context presented by Mr. McFarland's case, the rational ends of the law plainly contemplate meaningful representation of indigent capital federal habeas petitioners in connection with federal habeas proceedings. These ends require the appointment of counsel in advance of the filing of the petition and, in cases like McFarland's, a stay of execution. Whether jurisdiction lies under the All Writs Act, (a) because Mr. McFarland's *pro se* motion commenced a proceeding under 21 U.S.C. § 848(q), which needs an All Writs Act stay of execution in order to preserve the court's jurisdiction, or (b) because the court's prospective jurisdiction under the habeas corpus statute needs to be preserved by an All Writs Act stay, the All Writs Act provides authority for

appointing counsel and staying Mr. McFarland's execution.

On this basis as well, the Anti-Injunction Act, 28 U.S.C. § 2283, facilitates, rather than prohibits, the exercise of federal judicial power sought by Mr. McFarland. The equitable underpinnings of § 2283 permit the stay of the state court judgment to be entered here for one of three reasons: (1) it is expressly authorized by 28 U.S.C. § 2251 and that statute applies because the habeas proceeding was commenced by McFarland's *pro se* motion; (2) it is sufficiently authorized by § 848(q), in order to effectuate its provisions, to have been "expressly authorized" by Congress; and (3) it is authorized under the All Writs Act, and stays properly entered pursuant to that act are permitted under § 2283.

ARGUMENT

I. THE PAPERS FILED BY MR. McFARLAND IN THE DISTRICT COURT MARKED THE BEGINNING OF HIS HABEAS CORPUS PROCEEDING, TRIGGERED HIS RIGHT TO COUNSEL AND GAVE THE DISTRICT COURT JURISDICTION TO STAY HIS EXECUTION.

Frank McFarland – indigent, incarcerated, sentenced to death and without a lawyer – was unable to investigate, prepare, and file a habeas petition in federal district court that raised and properly pled all of the available and potentially meritorious constitutional claims for relief in his case. Accordingly, under threat of imminent execution, he filed a *pro se* pleading in which he informed

the district court that he "want[ed] to challenge [his] conviction and sentence under 28 U.S.C. § 2254," JA 42, and asked the district judge to appoint counsel who could prepare and file a proper habeas petition. Mr. McFarland relied on the automatic right to counsel for indigent capital habeas petitioners created by 21 U.S.C. § 848(q)(4)(B). He also asked the court to stay his execution long enough for counsel to do the investigation and research necessary to prepare a proper petition.[13] Mr. McFarland had made similar requests in the state courts, which denied them.

The district court and the Fifth Circuit held there was no jurisdiction to issue a stay for the purpose of giving counsel time to do her job, because no habeas proceeding was pending. In their view, Mr. McFarland's pleading did not commence such a proceeding, because he had not filed a habeas corpus petition.

The conclusions reached by the district court and Fifth Circuit are untenable. To hold that there was no jurisdiction to appoint counsel and stay Mr. McFarland's execution because he had not filed a proper and adequate habeas petition would totally defeat the evident legislative purpose underlying both 21 U.S.C. § 848(q)(4)(B) and 28 U.S.C. § 2251.

---

[13] The appointment of counsel under 21 U.S.C. § 848(q)(4)(B) is mandatory, upon request and a showing of indigency, "[i]n any post-conviction proceeding under [28 U.S.C.] Section 2254 . . . ," and a stay of execution under 28 U.S.C. § 2251 may be entered when "a habeas corpus proceeding is pending. . . . "

A. Section 848(q)(4)(B) Guarantees A Right To Counsel In Federal Habeas Proceedings For Death-Sentenced Prisoners That Attaches Before A Petitioner Files A Formal Application For Relief.

Enacted in 1988, § 848(q)(4)(B) provides:

> In any post conviction proceeding under Section 2254 or Section 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services *shall be entitled to the appointment* of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

21 U.S.C. § 848(q)(4)(B) (emphasis added). By its terms, this statute creates a mandatory entitlement to the assistance of counsel in federal habeas proceedings for indigent state and federal prisoners sentenced to die. *See Murray v. Giarratano*, 492 U.S. 1, 20 & n.7 (1989) (Stevens, J., dissenting on other grounds, joined by Brennan, Marshall & Blackmun, JJ.) (21 U.S.C. § 848(q)(4)(B) *requires* appointment of counsel in capital habeas cases).[14]

---

[14] Subsequent efforts in Congress to amend § 848 to make the appointment of counsel discretionary have consistently failed. *See, e.g.*, 139 CONG. RECORD (Senate) S2316, S2321 (March 3, 1993); *id.*, S842, S846 (Jan. 5, 1993); 137 CONG. RECORD (Senate) S3192, S3220 (Feb. 6, 1991); *id.*, S1069, S1073 (Jan. 3, 1991); 136 CONG. RECORD S9238, S9240 (Senate) (June 11, 1990); S 135 CONG. RECORD (Senate) S7288, S7293 (Jan. 3, 1989). Each of the proposed bills provided:

> In a proceeding under section 2254 of Title 28, United States Code, relating to a state capital case, or any

Prior to the enactment of § 848, any federal habeas petitioner could seek the appointment of counsel, for a specific purpose, in connection with discovery procedures and evidentiary hearings, *see* Rules 6(a) and 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts, or more generally, "at any stage of the case," *see* Rule 8(c), pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B). However, appointment of counsel under these provisions was discretionary, with the court free to determine whether "the interests of justice so require[d]," 18 U.S.C. § 3006A(a)(2)(B) and Rule 8(c), or whether appointment was "necessary for effective utilization of discovery procedures," Rule 6(a). By enacting the mandatory right to counsel in 21 U.S.C. § 848(q)(4)(B), Congress made a legislative determination that "the interests of justice" required the assistance of counsel in all capital habeas proceedings.

The precise question in this case is whether Congress intended the right to counsel to be available to death-sentenced prisoners *prior to* the filing of a proper habeas corpus petition. The analysis of this issue is to be undertaken in light of the rule that remedial statutes, such as § 848(q), must be liberally construed to effectuate their

---

subsequent proceeding on review, appointment for a petitioner who is or becomes financially unable to afford counsel *shall be in the discretion of the court. . . .*" (emphasis added).

These subsequent unsuccessful attempts to amend § 848(q)(4)(B) are relevant to this Court's interpretation of the statute. *Cf. Wright v. West*, 112 S. Ct. 2482, 2498 (1992) (O'Connor, J., concurring, joined by Blackmun & Stevens, JJ.) (discussing failed attempts to amend federal habeas statute).

remedial purposes. *See, e.g., Atchison, T. & S.F. R. Co. v. Buell*, 480 U.S. 557, 562 (1987); *S.E.C. v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943).

A close examination of § 848(q) and the context in which Congress enacted it reveals that Congress intended that condemned prisoners have access to counsel at every time relevant to the pursuit of habeas corpus relief in federal court – including the critical time preceding the filing of the habeas petition, when investigation, research, consultation with experts, identification of claims, and drafting the petition must be accomplished.

Three other provisions in § 848(q) compel this conclusion. Section 848(q)(4)(A) sets forth the statute's general provision for the appointment of counsel in death penalty cases:

> Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services *at any time* either –
>
> (i) before judgment; or
>
> (ii) *after the entry of judgment imposing a sentence of death but before the execution of that judgment;*
>
> shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

Id. (emphasis added). This provision makes the right to counsel available "at any time" a condemned person is or

becomes indigent "before the execution of [the death sentence]." Read together with § 848(q)(4)(B), which establishes the right to counsel "[i]n any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence," these provisions reflect an intent to make counsel universally available in all federal proceedings concerned with capital cases, not to deny counsel until a habeas petition has been filed.

Additional provisions of § 848(q) reflect this same intent. Section 848(q)(6) requires that counsel appointed "after judgment" – including both appellate and habeas counsel – meet certain years-of-relevant-experience qualifications. There are no similar qualification requirements for appointment of counsel in non-capital cases under 18 U.S.C. § 3006A. This requirement reflects the settled view that capital cases are more complex than non-capital cases, and thus require representation by more experienced lawyers. *See, e.g., Giarratano*, 492 U.S. at 28 & n.22 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) ("this Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master," and "[i]n apparent recognition of this fact, Congress has required that when a court appoints counsel in capital post conviction proceedings [under 21 U.S.C. § 848(q)(4)(B) and (q)(6)], [certain years-of-relevant-experience criteria must be met]").

In light of Congress' determinations that capital habeas petitioners must be provided specially qualified counsel, it is apparent that Congress intended that the assistance of counsel be afforded at every stage of a habeas proceeding in which the expertise of such counsel is particularly important. No one can seriously dispute

that the stage prior to the filing of the habeas petition is an essential one in the post conviction process, for it is there that counsel's expertise in investigating, researching, identifying, and properly drafting factually-supported claims that are potentially meritorious is not only valuable, but irreplaceable.

Capital cases are legally and factually complex because of the still-evolving Eighth Amendment principles that govern the sentencing proceeding and the need to investigate and litigate aggravating and mitigating circumstances. In addition, doctrines of waiver and forfeiture – procedural default, abuse of the writ, and the failure to adduce available facts in support of a claim when given the opportunity to do so – are not only complex but deadly if they are not carefully understood and observed at every stage of a capital case. *Cf. Coleman v. Thompson*, ___ U.S. ___, 112 S.Ct. 1845 (1992). These doctrines dictate both that counsel undertake meticulous, exhaustive investigation of the factual and legal bases of potential claims so that no meritorious claim is waived, and that she understand the rules governing their application so that potentially waived claims may be salvaged. *See McCleskey v. Zant*, 499 U.S. 467, 489-490 (1991) (tracing the parallel evolution of procedural default and abuse of the writ doctrines). Finally, since Rule 2(c) of the Rules Governing Section 2254 Cases requires fact pleading, not simply notice pleading, in the habeas petition,[15] counsel with expertise in the framing and drafting of habeas

---

[15] Rule 2(c) requires that the petition set forth "in summary form the facts supporting each of the grounds. . . ."

claims provides a critical safeguard against the unsuccessful pursuit of a claim due to inartful pleading.[16] The complexity of the law, the enormity of the fact-development tasks, and the need for careful drafting thus make it perilous for an unrepresented capital petitioner to prepare a federal habeas petition.[17] In view of Congress' judgment of the need for experienced counsel to represent death-sentenced petitioners, it would be inconsistent with the statute to hold that Congress did not intend to give them the assistance of counsel *prior* to the filing of the federal habeas petition, a time when counsel's expertise is so vital.

The final provision of § 848(q) that leads to this same conclusion is § 848(q)(9), which provides funds for "investigative, expert, or other services [that] are reasonably necessary for the representation" of the petitioner. Pursuant to this provision, "the court shall authorize the [petitioner's] attorneys to obtain such services on [behalf of the petitioner] and shall order the payment of fees and expenses therefor. . . . "

---

[16] This requirement is not always easily met, even by attorneys. *See Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (affirming the denial of habeas petition raising claim of ineffective assistance of counsel, because "[p]etitioner did not allege in his habeas petition" facts sufficient to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1983)).

[17] Justice Kennedy came to this conclusion in his concurrence, joined by Justice O'Connor, in *Giarratano*, 492 U.S. at 14: "The complexity of our jurisprudence in this area makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Accord id.* at 27-28 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting).

The stage of a habeas proceeding in which an investigator or expert is most needed is before the petition is filed. If non-record-based claims are identified, they can only be developed through investigation, with the assistance of investigators, social workers, mitigation experts, psychologists and psychiatrists, firearms and ballistics experts, pathologists, serologists, trace evidence experts, and others who can identify, probe, and draw conclusions regarding relevant facts through their expertise. To be sure, investigation and fact development does not end with the filing of a petition; but much of it must be completed before then. The district court's power to preliminarily examine and summarily dismiss a petition, *see* Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts, and the state's ability to test the factual allegations by motion for summary judgment, assure that petitions are not filed without considerable investigation. Plainly, § 848(q) contemplates that counsel will already have been appointed by the time the need for investigators and experts arises: the statutory mechanism for providing funds for investigative and expert services calls for the petitioner's attorneys to obtain them from the court. The model that members of Congress had in mind when they enacted § 848(q) thus reasonably included the assistance of counsel in advance of the filing of the petition.

That Congress intended to make counsel available to indigent capital federal habeas petitioners before any petition is filed is supported by at least two additional statutory features. The discretionary appointment of counsel under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), for a person "seeking relief under

[§ 2254 of Title 28]," has long been understood to allow the appointment of counsel *"at any stage of the case* if the interest of justice so requires." Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts (referring to the authority of the district court to appoint counsel under § 3006A at stages of the habeas proceeding other than an evidentiary hearing) (emphasis added). When Congress decided that fairness required the appointment of counsel in every capital habeas case, it must be assumed that Congress acted with the Criminal Justice Act in mind – and that it intended to provide more protection, not less, to capital habeas petitioners.

Finally, when Congress enacted § 848, it was legislating in a context which recognized that "death is different," and that this difference calls for greater safeguards against unreliability and unfairness. As was stated nearly two decades ago:

> [We] have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. [Citations omitted.] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion). One of the most troublesome threats to reliability and fairness articulated in the cases is that

invidious discrimination – based on race or class – might infect the administration of the death penalty. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 255-57 (1972) (Douglas, J., concurring) (finding constitutionally intolerable discrimination on the basis of "the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation," and thereby escape the death penalty); *id.* at 366 (Marshall, J., concurring) (finding that "the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged," whose "impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape").

The protections afforded to indigent prisoners under § 848(q) were responsive to these longstanding concerns: they were intended to eliminate, as much as possible, differential outcomes in capital cases on the basis of financial resources. In this light, it is inconceivable that Congress could have intended to deny indigent habeas petitioners access to counsel in the pre-petition stage of a habeas proceeding, when such assistance would be routine for a prisoner who could afford counsel. As we have demonstrated, the assistance of counsel in investigating, researching, identifying, and framing claims for habeas corpus relief is irreplaceable. If a condemned prisoner does not have that assistance, he is at a severe disadvantage. Given the congressional purpose in enacting § 848(q), Congress could not have intended to codify such a disparity.

B. The Papers Filed In the District Court Triggered Mr. McFarland's Right To Counsel Under § 848.

The circumstances presented by this appeal confirm the wisdom of Congress' judgment. As shown below, the assistance of counsel has meaning for Mr. McFarland only if counsel is appointed *prior* to the filing of his federal habeas petition.

Before filing his *pro se* motion asking the federal district court to appoint counsel and stay his execution, Mr. McFarland sought the same relief in the Texas courts. The state courts denied these requests, which left Mr. McFarland unable to pursue state collateral proceedings.

For this same reason, Mr. McFarland was not in a position to make a full challenge to his conviction and sentence when he appeared *pro se* in federal court. The only way Mr. McFarland could avail himself of his right to have the constitutionality of his conviction and sentence reviewed by a federal court was to obtain the assistance of counsel to prepare his federal habeas petition. Unlike in the state courts, however, in federal district court Mr. McFarland had the absolute statutory right to the assistance of counsel.

In these circumstances, Mr. McFarland faced a dilemma. On the one hand, he could file a *pro se* pleading denominated as a "petition" that he would ask the court *not* to treat as his final petition, but merely as the commencement of a federal habeas proceeding. At the same time, he could ask the court to appoint counsel and stay his execution in order to give counsel the opportunity to investigate and research other potential claims and file an

amended petition. While such a "petition" would necessarily be perfunctory, it would at least meet the State's objection that the filing of a petition is necessary to commence a "proceeding" and thus give the court jurisdiction to appoint counsel and stay his execution. After the recent experience in *Gosch v. Collins*, *supra*, however, if Mr. McFarland had pursued this course, he could reasonably have expected that his effort to obtain the assistance of counsel and a stay would fail.[18]

On the other hand, if Mr. McFarland did not file a petition raising formal grounds for relief, he risked encountering the argument pressed by the State of Texas in this case – that a district court acquires jurisdiction to stay an execution only when the petitioner files a formal application for habeas relief.

The prospect that the district court would require a formal habeas petition to invoke its jurisdiction, but nonetheless apply *Barefoot v. Estelle*, 463 U.S. 880 (1983), to judge the adequacy of any petition filed,[19] illuminates the fundamental problem that drove the case to this Court: *Mr. McFarland could not secure statutorily mandated counsel and a stay of execution unless and until he prepared a document that he could not prepare without the assistance of*

---

[18] *See* discussion of *Gosch*, *supra*, at 6-7.

[19] The Fifth Circuit's formulation of the *Barefoot* standard would have required Mr. McFarland to " 'present a substantial case on the merits . . . and show that the balance of the equities . . . weighs heavily in the favor of granting the stay.' " *O'Bryan v. McKaskle*, 729 F.2d 991, 993 (5th Cir. 1984), *quoting Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982). *Accord Selvage v. Lynaugh*, 842 F.2d 89, 91 (5th Cir. 1988).

counsel. He could not escape this fatal paradox unless the district court provided counsel to help him prepare and file an adequate habeas petition in federal court.

For these reasons, the only sensible reading of § 848(q)(4)(B) is that the right to counsel established by that section includes the right to the assistance of counsel in the pre-petition stage of a federal habeas proceeding. Put differently, the Court should make clear that a habeas "proceeding" has been commenced within the meaning of § 848(q)(4)(B) when a pleading has been filed expressing a settled intention to challenge the conviction and/or death sentence under 28 U.S.C. § 2254 and requesting the appointment of counsel to enable the condemned petitioner to mount that challenge.

It is clear from this analysis that the papers Mr. McFarland filed in federal district court commenced his post conviction proceeding and entitled him to the assistance of counsel under § 848(q)(4)(B). And as shown below, it follows inevitably from that conclusion that a reasonable stay of execution was also necessary to satisfy the requirements of § 848(q).

C. The Papers Filed Below Gave The Court Jurisdiction To Stay The Execution.

Mr. McFarland was scheduled to be executed five days after he filed his *pro se* papers. JA 41. No lawyer could have provided adequate representation in five days. Thus, for Mr. McFarland to have the assistance of counsel to which he was entitled, he also had to have a stay of execution.

Just as no jurisdictional barrier prevented the appointment of counsel in the circumstances of Mr. McFarland's case, no jurisdictional barrier precluded a stay of his execution under 28 U.S.C. § 2251, which authorizes a district court to stay an execution during the pendency of any "habeas corpus proceeding."[20] In interpreting § 848(q)(4)(B) – which entitles the petitioner to counsel during any "post conviction proceeding" – and § 2251 – which authorizes a district court to enter a stay during any "habeas corpus proceeding" – the object must be to "make sense rather than nonsense" out of the statutory scheme as a whole.[21] To achieve a sensible accommodation of these two statutes, the Court need only apply a settled rule of statutory interpretation: "[A] legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). This is particularly so when the two provisions share a common purpose. *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973).

---

[20] Section 2251 provides in relevant part:

> A justice or judge of the United States before whom a habeas corpus proceeding is pending may . . . stay any state proceeding against a person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

28 U.S.C. § 2251.

[21] *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991) (courts must construe ambiguous statutory language "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law . . . and thus make sense rather than nonsense out of the corpus juris").

In this case, the statutes only "make sense" if § 2251 authorized a stay at the same moment that § 848 entitled Mr. McFarland to counsel. Manifestly, a state prisoner seeking federal review has only one "proceeding," whether it is described as a proceeding for "post conviction" relief (as in § 848), or for "habeas corpus" relief (as in § 2251). Such a proceeding commences, for jurisdictional purposes, when a prisoner files a pleading that indicates a firm intention to challenge his conviction and/or sentence under the Constitution of the United States and asks the court for counsel and a stay. That filing empowers a federal court to take at least the preliminary action requested. In addition, § 2251 and § 848 share a common design: both are essential tools for conducting a reliable inquiry into the constitutionality of a petitioner's conviction and sentence. Section 2251 allows the court to preserve its jurisdiction over the person and subject matter of the lawsuit while it considers the merits of the case without the threat of imminent execution; § 848 permits the court to resolve a petitioner's potentially meritorious claims based on a careful presentation by qualified counsel. These two provisions work in tandem, rationalizing the process by which the habeas court discharges the duties imposed by the invocation of the habeas remedy by a *pro se* petitioner. Reading § 2251 and § 848 in this fashion is consistent with both the "statutory developments" reflected in 21 U.S.C. § 848(q)(4)(B) and the "complex and evolving body of equitable principles informed and controlled by historical usage . . . and

judicial decisions," *McCleskey v. Zant*, 499 U.S. at 489, which together guide the Court's habeas decisions.[22]

In sum, since Mr. McFarland began his "post conviction proceeding" when he asked the district court to stay his execution and appoint counsel, the Court should also conclude that he began his "habeas corpus proceeding" at the same moment, which gave the district court jurisdiction to stay his imminent execution under § 2251.[23] This

---

[22] The Court has frequently admonished the lower courts to administer the writ of habeas corpus "with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969); *see also Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). "Thus, [this Court] ha[s] consistently rejected interpretations of the habeas corpus statute[s] that would suffocate the writ in stifling formalisms or hobble its effectiveness with manacles of arcane and scholastic procedural requirements." *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973). Rather, "the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may . . . deal effectively with any and all form of illegal restraint." *Price v. Johnson*, 334 U.S. 266, 283 (1948).

[23] FED. R. CIV. PRO. 3, which states that "[a] civil action is commenced by the filing of a complaint in the court," does not require the filing of a habeas corpus "petition" or "application" in order to commence a "habeas corpus proceeding" within the meaning of 28 U.S.C. § 2251. *See Brown v. Vasquez*, 952 F.2d 1164, 1169 (9th Cir. 1991). Although a habeas corpus case is theoretically a "civil" action, "th[at] label is gross and inexact." *Harris v. Nelson*, 394 U.S. 286, 294-95 (1969). Habeas Corpus Rule 11 thus provides that the Federal Rules of Civil Procedure are inapplicable to the extent that they are "inconsistent" with habeas rules. *See also* Advisory Notes to Rule 11 (noting that federal procedure rules should not be applied "rigidly" or "inequitabl[y]" in habeas cases). For the reasons stated above, application of FED. R. CIV. PRO. 3 would be inconsistent with

result allows a federal court to "make sense" of the statutory scheme by granting a stay long enough for counsel to do his job. More to the point, it corrects the anomalous and intolerable result created by the Fifth Circuit, which would degrade the Great Writ by permitting the State to execute a *pro se* inmate because he has failed to do the very thing his *pro se* status prevents him from doing – filing a meaningful habeas petition.

II. THE ALL WRITS ACT, 28 U.S.C. § 1651(a), GAVE THE DISTRICT COURT AUTHORITY TO GRANT A STAY AND APPOINT COUNSEL.

The All Writs Act also permitted the district court to stay Mr. McFarland's execution and appoint counsel to represent him.

The All Writs Act, 28 U.S.C. § 1651(a), authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This enactment "make[s] explicit the right to exercise powers implied from the creation of such courts." Reviser's Notes, 28 U.S.C.A. § 1651 (West 1981). The Act thus codifies a federal court's inherent equitable authority to issue stays or other writs necessary to "fill[] the interstices of federal judicial power when those gaps threaten to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania Bureau of Correction v. United States Marshals*

---

longstanding equitable principles governing federal habeas corpus.

Service, 474 U.S. 34, 42 (1985). As the Court recognized in a habeas corpus context, the Act is thus intended to serve as a "legislatively approved source of procedural instruments designed to achieve the rational ends of law." *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (internal quotation and citations omitted). The variety of circumstances in which the Court has both applied and approved the use of the Act illustrates the breadth of its equitable reach.

Of particular significance here, numerous decisions of this Court have interpreted the Act to allow a federal court to grant an injunction "in aid of" that court's *prospective* jurisdiction.[24] In the leading case of *FTC v. Dean Foods Co.*, 384 U.S. 597 (1965), *modified on other grounds, Sampson v. Murray*, 415 U.S. 61 (1974), the Court held that the All Writs Act authorized a federal circuit court to enjoin a corporate merger to preserve the court's future appellate jurisdiction over a forthcoming decision by the Federal Trade Commission regarding the legality of the merger under the antitrust laws. Such injunctive relief, the Court held, was "in aid [of] the potential jurisdiction

---

[24] *See, e.g., FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1965); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943); *McClellan v. Carland*, 217 U.S. 268, 280 (1910); *Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992) ("The federal courts' authority under the All Writs Act [is] to be used 'in aid of their prospective jurisdiction.' " (citation omitted); *ITT Community Develop. Corp. v. Barton*, 569 F.2d 1351, 1359 n.19 (5th Cir. 1978) ("A federal court has the power under the All Writs Act to issue injunctive orders in a case even before the court's jurisdiction has been established"). *See also Republican State Central Committee of Arizona v. Ripon Society*, 409 U.S. 1222, 1225 (1972) (Rehnquist, J., in chambers) ("a stay here [under § 1651] preserves issues for review").

of the appellate court where an appeal is not then pending but may later be perfected." *Id.* at 603 (collecting cases).

The Court has similarly held that the All Writs Act permits a federal appellate court to preserve its prospective habeas corpus jurisdiction in a capital case by staying an imminent execution. *See Woodward v. Hutchins*, 464 U.S. 377 (1984) (per curiam). In *Woodward*, a capital habeas petitioner filed a habeas corpus petition and a motion for stay of execution in federal district court on the eve of a scheduled execution. The district court denied a stay but refused to rule on the petition. That refusal prevented the petitioner from pursuing an appeal, thus requiring some alternative basis for the appellate court's exercise of power to preserve the status quo pending its anticipated appellate jurisdiction over the district court's order. The petitioner filed an original application for stay with a single judge of the Fourth Circuit, who granted the request. See *id.* at 381-82 (Brennan, J., dissenting). On appeal, the Court held that the circuit judge had jurisdiction to enter the stay under the All Writs Act, even though no other statutory provision gave the circuit judge present jurisdiction to enter a stay. *Woodward*, 464 U.S. at 377; *id.* at 382 (Brennan, J., dissenting). *See also Lenhard v. Wolff*, 443 U.S. 1306 (1979) (Rehnquist, J., in chambers) (citing 28 U.S.C. § 1651(a) as authority to grant a stay in federal habeas death penalty case).[25]

---

[25] Similarly, in *Land v. Florida*, 377 U.S. 959 (1964), the Court denied a *pro se* capital defendant's petition for writ of certiorari filed on direct appeal, but stayed his execution for sixty days from the date of the denial "to allow the petitioner to file a petition for a writ of habeas corpus." The Court also held, that should Land file a petition, the stay would remain in effect pending its disposition. *Id.* at 959. Authority for this stay could come only from the All Writs Act, since no other provision would have provided the Court with jurisdiction to enter a stay once it had denied the petition for certiorari.

These cases demonstrate that a district court, acting under the All Writs Act, has authority to afford the relief sought by Mr. McFarland's *pro se* motions. Even if § 848 and § 2251 were unavailable prior to the filing of a petition, the district court nonetheless could stay Mr. McFarland's execution and appoint counsel to preserve its undisputed *prospective* jurisdiction under the entire federal habeas corpus statutory scheme, including 21 U.S.C. § 848(q)(4)(B). That is, since the protections afforded by the habeas statutes – including the right to counsel – cannot be given effect without some limited window of time in which counsel can be appointed and prepare a habeas petition, the district court can only "achieve the rational ends of the law" by staying the imminent execution. *Harris v. Nelson*, 394 U.S. at 299. A stay under the All Writs Act thus serves as a temporal bridge, spanning the point at which a *pro se* prisoner can indicate his intention to invoke the court's jurisdiction and the point when counsel can file a meaningful habeas petition.[26] *See Brown v. Vasquez*, 743 F. Supp. 729 (C.D.

---

[26] Since the stay would be entered only to bridge the gap until Mr. McFarland could file a formal application for relief, it need not extend past the point at which such an application is filed. Indeed, once a formal application is filed, the district court may conclude it presents no colorable claims for relief, and dissolve the stay. In addition, the bridge urged by Mr. McFarland would not extend for an indefinite duration, since the

Cal. 1990), *aff'd on other grounds*, 952 F.2d 1164 (9th Cir. 1991) (federal district court has jurisdiction under All Writs Act to stay scheduled execution of *pro se* death row inmate to protect prospective jurisdiction under federal habeas statutes). The All Writs Act thus "fills the interstice[] of federal judicial power," *Pennsylvania Bureau of Correction*, 474 U.S. at 42, and allows the district court to prevent the execution of a *pro se* indigent death row inmate simply because he is temporarily unable to prepare and file the document that would indisputably vest the district court with present, as opposed to prospective, jurisdiction.

The All Writs Act also makes plain that the district court has authority to appoint counsel to help Mr. McFarland prepare a formal application for relief. Justice Frankfurter, writing for the Court in *Brown v. Allen*, recognized that "a lawyer may be appointed, in the exercise of the inherent authority of the District Court, . . . as counsel for the [habeas] petitioner. . . . " 344 U.S. 443, 502 (1954). Justice Frankfurter's discussion of a federal court's "inherent" authority to appoint counsel in federal habeas is instructive in the present context because, as noted, the All Writs Act "make[s] explicit the right to exercise powers *implied from the creation of such courts*." Reviser's Notes, 28 U.S.C.A. § 1651 (West 1981) (emphasis added).

---

district court could impose a deadline by which appointed counsel must either file a formal application, or advise the court based on a review of the record and an adequate investigation that the petitioner cannot state a colorable claim for relief. This result would not alter the Court's holding in *Barefoot v. Estelle*, 463 U.S. 880 (1983), and would not prevent the expeditious resolution of such cases.

That is, the All Writs Act declares the *inherent* authority of a federal court to issue those writs necessary to its prospective jurisdiction.

As discussed in Point I, *supra*, the assistance of counsel is necessary to effectuate the procedural and substantive rights guaranteed to a state death row inmate in a federal habeas corpus proceeding. Indeed, because the Fifth Circuit in *Gosch* effectively instructed the federal district courts in Texas to judge the sufficiency of any petition, even a *pro se* petition filed solely to resolve the district court's jurisdiction to stay an execution, under the standard established in *Barefoot*, the assistance of counsel to help prepare such a petition is the *sine qua non* of any further proceedings.

Mr. McFarland's case, in this respect, resembles *Harris v. Nelson*. In *Harris*, the Court held that the All Writs Act gave the district court authority to order discovery in federal habeas corpus as part of "the inescapable obligation of the courts," even though the Federal Rules of Civil Procedure at that time did not apply to federal habeas corpus proceedings. 394 U.S. at 298-99. While the significance of full discovery cannot be denied, it pales in comparison to the singular importance of the assistance of counsel to effectuate any post conviction remedy. Accordingly, because district courts have the inherent authority to appoint counsel to prepare a habeas corpus petition, and because counsel was necessary in this case to give effect to the Great Writ, the All Writs Act provided the district court with authority to appoint counsel to prepare the document that would subsequently confirm the court's present jurisdiction.

III.

THE ANTI-INJUNCTION ACT, 28 U.S.C. § 2283, DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION OR AUTHORITY TO STAY MR. McFARLAND'S EXECUTION.

A. As a Non-Jurisdictional Statutory Reflection of Federalism, the Anti-Injunction Act Should Not Be Mechanically Applied to Defeat Federal Interests When the Balance of Equities Weighs in Their Favor.

Originally enacted in 1789, the Anti-Injunction Act currently provides that, subject to important exceptions, a federal court "may not grant an injunction to stay proceedings in a State court. . . . " 28 U.S.C. § 2283. In the first century and a half after the statute was enacted, federal courts grafted a number of exceptions onto the general rule.[27] This history led the Court later to observe, in *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920), that the Anti-Injunction Act and its exceptions were merely an expression of the well-established rule of comity between state and federal courts:

> The provision has been in force more than a century and has often been considered by this court. *As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation.* Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in

[27] *See Mitchum v. Foster*, 407 U.S. 225, 233-34 (1972); *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 134-39 (1941).

> their discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated.

Id. at 183 (emphasis added).

In 1941, the Court reinterpreted the statute as an essentially unqualified proscription, permitting no exceptions. *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 132 (1941). Congress responded in 1948 by amending the Act so as to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision." Reviser's Note, 28 U.S.C.A. § 2283 (West 1981); *see also* H.R. Rep. No. 308, 80th Cong., 1st Sess., A181-82 (1947); *Mitchum v. Foster*, 407 U.S. 225, 236-37 nn.21-22 (1972) (discussing legislative history of 1948 amendment); 16 Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE § 4221 at 499-500 (1978 & 1987).

To achieve this end, Congress created three statutory exceptions to the Anti-Injunction Act that remain in force today. The exceptions permit federal stays of state court proceedings: (i) when another congressional statute authorizes such a stay; (ii) when a stay is necessary "in aid of" a federal court's jurisdiction; and (iii) when a stay is necessary "to protect or effectuate [federal] judgments." *See Younger v. Harris*, 401 U.S. 37, 43 (1971).

In light of the 1948 amendment and the anti-injunction jurisprudence prior to *Toucey*, the Anti-Injunction Act should not be read as a jurisdictional bar to federal injunctions of state court proceedings,[28] but instead as a

[28] *See Smith v. Apple*, 264 U.S. 274, 278-79 (1924); *Gloucester M.R. Corp. v. Charles Parisi, Inc.*, 848 F.2d 12, 15 (1st Cir. 1988);

"limitation upon the general equity powers of the United States Courts." *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 74 (1939); *see also Smith v. Apple*, 264 U.S. at 278-79. There is no occasion for such limitation when the statutory exceptions apply and especially when the execution of a state court judgment would "be contrary to recognized principles of equity and the standards of good conscience." *Wells Fargo*, 254 U.S. at 183-84 (citations omitted); *see also Essanay Film Manufacturing Co. v. Kane*, 258 U.S. 358, 360 (1922).

Another lodestone in interpreting the Anti-Injunction Act is consistency with our system of federalism. While the Act is enforced strictly when a state court's legitimate interests would otherwise be unduly infringed by a federal court injunction, by the same token state court proceedings must give way when weightier federal interests are at stake. *See Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 226 (1957); *cf. Younger*, 401 U.S. at 44 ("[Federalism] does not mean blind deference to 'State's Rights' [but] a system in which there is sensitivity to the legitimate interests of both State and National Governments").

Permitting Texas to execute Mr. McFarland, a *pro se* indigent death row inmate, before he has had a meaningful opportunity, with the assistance of counsel, to pursue

---

Airlines Reporting Corp. v. Barry, 825 F.2d 1220, 1225 (8th Cir. 1987); *Re: Moody Aircraft, Inc.*, 730 F.2d 367, 374 (5th Cir. 1984); *Baines v. City of Danville*, 337 F.2d 579, 593 (4th Cir. 1964); *see also* 17 Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE, § 4222, at 514 (1978 & 1987) (collecting "cases that have said that the Anti-Injunction Act is not jurisdictional"); 1A Moore's Federal Practice § 0.208, at 2313-14.

his statutory right to collateral review of his conviction and death sentence is inconsistent with our federalism. While state court judgments in criminal cases are entitled to respect in our federal system, the federal habeas statutes interpose a superior federal interest of having such state court judgments reviewed for harmful constitutional error in a federal court. Because Congress never intended that the federal courts would stand by while the state executes an indigent prisoner under these circumstances, the federal interest at stake in this case must prevail.

B. Mr. McFarland's Case Falls Within The First Statutory Exception To The Anti-Injunction Act, Since A Stay Is Necessary To Enforce A Uniquely Federal Right.

The first statutory exception to the Act allows a federal court to stay a state court proceeding if an Act of Congress has authorized a stay in another statute. *See* 28 U.S.C. § 2283. In *Mitchum v. Foster*, 407 U.S. 225 (1972), this Court held that the first exception to the Anti-Injunction Act must be interpreted to give full effect to an intended federal right:

> [I]t is clear that, in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. The test [is] whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be

given its intended scope only by the stay of a state court proceeding.

Id. at 237-38 (emphasis added).

28 U.S.C. § 2251 expressly provides that federal courts "may . . . stay any proceeding . . . in any State court or by or under [state] . . . authority" during the pendency of § 2254 proceedings. This is a specific congressional grant of authority to stay state proceedings. *See* Wright, Miller & Cooper, 17 FEDERAL PRACTICE & PROCEDURE, § 4224, 521-22 (1978 & 1987). As discussed above, § 2251 provided the lower courts with jurisdiction to stay Mr. McFarland's execution, and a stay under that provision does not violate the Anti-Injunction Act.

Even if § 2251 were not available, § 848(q)(4)(B) would be enough to invoke the first exception to the Anti-Injunction Act. As demonstrated in Point I, *supra*, § 848(q)(4)(B) *requires* a federal district court to appoint counsel for an indigent *pro se* death row inmate to enable the inmate to prepare and pursue a habeas corpus petition. With § 848(q)(4)(B), therefore, Congress has "created a specific and uniquely federal right or remedy" that not only "could be frustrated," but would be utterly defeated "if the federal court[s] were not empowered to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. at 237-38.

Thus, under the first exception to the Anti-Injunction Act, the district court was empowered to stay Mr. McFarland's execution to assure that his federal habeas case would be heard and to protect his right to counsel.[29]

C. Mr. McFarland's Case Also Falls Within The Second Exception To The Act, Because A Stay of Execution Is "In Aid Of" The Court's Prospective Jurisdiction Under The Federal Habeas Corpus Statute.

A stay of execution in this case also falls within the second exception to the Anti-Injunction Act, which allows a federal court, "in aid of its jurisdiction," to stay state proceedings. 28 U.S.C. § 2283. The similarity between this contention and the analysis of the All Writs Act in Section II, *supra*, is no coincidence. Congress intended the second exception of the Anti-Injunction Act to incorporate the

---

[29] As discussed above, the All Writs Act, 28 U.S.C. § 1651(a), provided the district court with jurisdiction to enter a stay of Mr. McFarland's scheduled execution in order to preserve the federal court's prospective jurisdiction under the federal habeas statutory scheme. While the plain language of the All Writs Act falls squarely within the second exception to the Anti-Injunction Act, *see infra*, the All Writs Act is also an Act of Congress that expressly authorizes a stay of state court proceedings within the meaning of the first exception to the Act. "Whether viewed as an affirmative grant of power to the [federal] courts or as an exception to the Anti-Injunction Act, the All Writs Act permits courts to . . . stay pending . . . state cases" where appropriate. *In re Joint Eastern & Southern District Asbestos Litigation*, 134 F.R.D. 32, 37 (E.& S.D.N.Y. 1990) (Weinstein, J.). Because the district court also had jurisdiction under the All Writs Act, a stay of execution fell within the first exception to the Act.

All Writs Act. As the Reviser's Note to the 1948 amendment to the Anti-Injunction Act explains, "[t]he phrase 'in aid of jurisdiction' was added to conform to section 1651 of this title. . . . " Reviser's Note, 28 U.S.C.A. § 2283 (West 1981).[30] Accordingly, the two statutes must be read in conjunction.[31]

Even if the legislative history were not considered dispositive, under well-established principles of statutory construction, this Court must treat the second exception to the Anti-Injunction Act and the All Writs Act as *in pari materia*. Both statutes govern equitable injunctive relief granted by federal courts and are closely related provisions in Title 28 of the United States Code; they use virtually the same language and both were passed by Congress in 1948. As the Court has explained,

> The rule of *in pari materia* – like any canon of statutory construction – is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. . . . [T]he rule's application certainly makes

---

[30] *See also* William T. Mayton, *Erstaz Federalism Under the Anti-Injunction Statute*, 72 COLUM. L. REV. 330, 363 (1978) ("[T]he legislative history also states that the [second] exception was added 'to conform' to the all writs statute, *thereby indicating an authority to issue writs in aid of jurisdiction consistent with the broad authority conferred by that statute.*") (emphasis added).

[31] *See Kline v. Burke Construction Co.*, 260 U.S. 226, 228-29 (1922); *General Railway Signal Co. v. Corcoran*, 921 F.2d 700, 707 (7th Cir. 1991); *In re Baldwin-United Corporation*, 770 F.2d 328, 335 (2d Cir. 1985); *Jennings v. Boenning & Co.*, 482 F.2d 1128, 1135 n.5 (3d Cir. 1973); *see also* 1A Moore's Federal Practice, § 0.208, at 2313; 19 Fed. Proc. L. Ed. § 47:97, at 506.

> the most sense when the statutes were enacted by the same legislative body at the same time.
>
> *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). *Accord Northcross v. Board of Education*, 412 U.S. 427, 428 (1973); *United States v. Stewart*, 311 U.S. 60, 64 (1940).

Accordingly, because the All Writs Act and the second exception to the Anti-Injunction Act are *in pari materia*, the application of the All Writs Act to a federal court's prospective jurisdiction applies equally to the construction given to the second exception to the Anti-Injunction Act. And because, as demonstrated above, the district court had jurisdiction under the All Writs Act to stay the execution, the stay itself falls within the second exception to the Anti-Injunction Act.

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Fifth Circuit must be reversed and the case remanded for the appointment of counsel to represent Mr. McFarland in his § 2254 proceeding.

Respectfully submitted,

* Mandy Welch
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917
fax (713) 522-2733

Douglas G. Robinson
Skadden, Arps, Slate,
Meagher & Flom
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7800
fax (202) 393-5760

* Counsel of record